cessive violence which Scrutton L.J. (*supra*) held might pass beyond the description of an unauthorised mode of doing an impliedly authorised act. Their Lordships do not find it necessary to consider the point. They conclude that there was no evidence which would justify the ascription of the act of the conductor to any authority, express or implied, vested in him by his employers; there is, accordingly, no legal ground for holding that the facts of this case justify a departure from the ordinary rule of *culpa tenet suos auctores*.

Their Lordships will therefore allow the appeal, set aside the order of the Court of Appeal and also set aside the judgment of the trial judge in so far as it was a judgment against the appellants. The respondent must pay the costs of the appellants before the trial judge, in the Court of Appeal and before their Lordships.

Appeal allowed.

Solicitors: *Coward Chance; Le Brasseur & Oakley.*

HITAM BIN ABDULLAH & ANOR. v. KOK FOONG YEE (f) & ANOR.

[P.C. (Lord Wilberforce, Lord Diplock, Lord Cross of Chelsea, Lord Kilbrandon, Sir Harry Gibbs) May 20, 1974]
[Privy Council Appeal No. 5 of 1973]

Negligence — Motor accident — Rejection of evidence of eye-witnesses — Inferences drawn by trial judge — Concurrent findings of lower courts on facts — Interference.

The trial judge made certain inferences of fact in relation to the respective vehicles involved in the motor accident which gave rise to this case. Judgment which was given for the respondents was upheld by the Federal Court. There were some differences between the reasons given by the trial judge and those given by the Federal Court. Before the Board counsel sought to show that there was no evidence to support the findings of the lower courts.

Held: (1) as there was evidence to support the inferences drawn by the trial judge it was not proper for their Lordships to review the evidence with a view to considering whether the concurrent findings were correct;

(2) there was no reason to depart from the established rule that their Lordships' Board will decline to interfere on a pure question of fact.

Case referred to:-

(1) *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [1946] A.C. 508.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Robert Alexander Q.C. and *Roger Buckley* for the appellants.

Ian Baillieu and *David Tay* for the respondents.

Sir Harry Gibbs (delivering judgment of the Board): This is an appeal from a judgment and order of the Federal Court of Malaysia which dismissed an appeal from a judgment given by the High Court in Malaya in favour of the present respondents. The action was brought on behalf of the estate and dependants of Cheong Chok Heng ("the deceased") who sustained fatal injuries when a motor car which he was driving collided with a lorry driven by the first appellant as servant or agent of the second appellant. The only issues at the trial were whether the collision had been caused by the negligence of the first appellant, and if so, whether the deceased had been contributorily negligent. The High Court answered the first question in the affirmative and the second in the negative and the Federal Court on appeal reached the same conclusions.

The collision occurred at about 2 o'clock in the afternoon on a roadway between Kuantan and Kemaman. The first appellant, who was driving the lorry in the direction of Kuantan, had rounded a right-hand bend and had driven for some distance along a straight stretch of road before his vehicle collided with the deceased's motor car which had been proceeding in the opposite direction. The photographs tendered in evidence show that each vehicle was damaged on its offside at the front. The only direct evidence as to the occurrence was given by the first appellant and by another person who had been a passenger in the lorry. They asserted that the brakes of the lorry had been applied and the lorry had been stopped before the collision and that the collision was caused because the deceased drove his car on the wrong side of the road. Two other witnesses, both of whom were lorry drivers and acquaintances of the first appellant, said that they had seen the deceased driving in an erratic and dangerous manner before the collision occurred. However, the trial judge placed no reliance on any of this evidence. He did not accept the testimony of the first appellant and his passenger as to the manner in which the lorry had been driven or as to the position of the car, and he regarded the evidence of the other two witnesses as probably fabricated and as in any case not of assistance in relation to the question whether the deceased had been at fault immediately before the collision. His conclusions that the first appellant had been negligent and that the deceased had not been guilty of contributory negligence were based on the evidence of an Inspector of Police who visited the scene of the accident some time afterwards, and particularly on a sketch plan drawn by the Inspector which showed the position of the vehicles after the collision, the tyre marks seen on and near the roadway and two heaps of fragments of glass found in the vicinity, one on the roadway and the other on the grass verge beside it on the right-hand side having regard to the direction in which the lorry was proceeding.

The trial judge found that some tyre marks, shown on the plan as A.1-A.3, A.4-A.5 and B.1-B.2, were made by the lorry. He considered that mark A.1-A.3, which was partly on the roadway and partly on the grass verge to the left of it, showed that the first appellant had driven at great speed and had lost control of the lorry when negotiating the bend. Marks A.4-A.5 and B.1-B.2 were admitted by the appellants to have been made by the lorry and clearly showed that at the time of the collision the lorry was being driven over the crown of the road so that its off-side encroached on to its wrong side of the roadway. There were some further marks, C.1 and C.2, which the judge found "could only have been caused by the offside wheels of the car" and which, if so caused, showed that the car was on its correct side of the road immediately before the collision. The judge accordingly found that at the time of the collision, the car was well on its correct side of the road. He appears to have considered that the glass on the roadway marked the

point where the collision occurred. On appeal, the Federal Court placed no reliance on the marks A.1-A.3 and expressed the opinion that the impact occurred somewhere between the two heaps of glass. However, that court affirmed the conclusion of the trial judge that at the time of the collision, the car was well inside its own half of the roadway and that the lorry was over the crown of the road.

Before their Lordships' Board, counsel for the appellants submitted that there was no evidence on which the trial judge could conclude that the marks C.1-C.2 were made by the offside wheels of the car and that on the whole of the evidence the probability was that they were made by the car's nearside wheels; if so, the car was being driven on its incorrect side of the road and the trial judge should at least have found that the deceased was guilty of contributory negligence. Further it was submitted that since the trial judge had rejected the evidence of the eye-witnesses, the question was what inferences should properly be drawn from the facts disclosed by the plan and that the trial judge was in no better position than an appellate court to decide that question.

It is very well established that as a general rule, their Lordships' Board will decline to interfere with the concurrent findings of two courts on a pure question of fact. The nature of the exceptions that will justify a departure from the Board's settled practice are set out in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*[1] at page 521. Lord Thankerton there said:

"That in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure."

He defined "miscarriage of justice" and then continued:

"That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

Counsel for the appellants relied on this statement and sought to show that there was no evidence to support the finding that when the collision occurred, the car was on its correct side of the roadway. Their Lordships, however, consider that the sketch plan and photographs and the facts which they revealed as to the path taken by the lorry, the position of the two vehicles and of the two heaps of glass after the collision, and the nature of the damage suffered by the respective vehicles, provided some evidence from which it could have been inferred that the marks C.1-C.2 were made by the offside rather than by the nearside wheels of the car and that the car was accordingly on its correct side of the road. Having reached this conclusion, their Lordships do not think it proper to review the evidence with a view to considering whether the concurrent findings were correct. The fact that there were some differences between the reasons given by the trial judge and those given by the Federal Court does not justify the intervention of the Board, *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*, *supra*, at page 521, and there are no other circumstances in the case that would justify a departure from the settled practice of the Board.

Their Lordships will therefore advise the Head of Malaysia that the appeal should be dismissed and that the appellants should pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Stephenson Harwood & Tatham; Le Brasseur & Oakley.*

SOUTHERN PORTLAND CEMENT LTD. v. COOPER

[P.C. (Lord Reid, Lord Morris of Borth-y-Gest, Lord Wilberforce, Lord Simon of Glaisdale, and Lord Salmon) November 19, 1973]
[Privy Council Appeal No. 32 of 1972]

Tort — Occupier's liability — Trespasser — Liability to child trespasser — Sandhills in limestone quarry allurement to children — Children in habit of playing in vicinity — Child trespasser injured by contact with electric cable — Occupier's duty to trespassers — Application of neighbourhood principle.

The appellants who carried on the business of quarrying limestone, knew that children were in the habit of playing at various places not far from the working area of the quarry and they took steps that the children in the township and attending school were informed that the quarry was out of bounds. The appellants decided to extend the backshunt for the wagons used to carry limestone from the quarry and to make this extension possible they raised the ground level by dumping large quantities of coarse sand. The sandhill thus formed partially buried the poles carrying the electric cable supplying power to the quarry. When the cable was only 12 feet above the sandhill, the appellants gave orders that no more sand should be dumped there but these orders were disobeyed. About two months later, the height of the cable above the sandhill was such that the appellants arranged for the cable to be moved as a matter of urgency on the Monday following. On the Sunday, the respondent, a boy of 13 years trespassed on the land with three other children and while playing on the sandhill he sustained severe injuries by coming into contact with the electric cable. He claimed damages in an action against the appellants alleging *inter alia* breach of duty by the appellants in their capacity as occupiers of the land upon which there was an allurement to children and that he was so allured. The jury returned a verdict in the respondent's favour. The verdict was set aside by the Court of Appeal, but was restored by the High Court. On appeal by the appellants to the Judicial Committee of the Privy Council.

Held, dismissing the appeal: (1) the fundamental difference between the relationship of occupier and trespasser and other relationships which give rise to a duty of care is that the occupier's relationship with a trespasser is forced on him against his will, whereas other relationships are generally undertaken voluntarily; and it would therefore be unjust to subject him to the full obligations resulting from the neighbourhood relationship in the ordinary way;

(2) the nature and extent of an occupier's duty to a trespasser must be based on considerations of humanity — the problem is to determine what would have been the decision of a humane man with the financial and other limitations of the occupier;

(3) the rights and interests of the occupier must be given full consideration. No unreasonable burden must be put on him. With regard to dangers which have arisen on his land without his knowledge he can have no obligation to make inquiries or inspection. With regard to dangers of which he has knowledge, but which he did not create he cannot be required to incur what for him would be a large expense. If, however the occupier creates the danger when he knows that there is a chance that trespassers will come that way and will not see or realise the danger he may have to do more;